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No. 91-904

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC.,
Petitioner,

v.

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND IN SUPPORT OF RESPONDENT

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Central States, Southeast and Southwest Areas Pension Fund ("Central States") moves the Court for leave to file the attached brief as *amicus curiae* in support of respondent, Construction Laborers Pension Trust for Southern California. Central States urges that the United States Court of Appeals for the Ninth Circuit be affirmed. The reasons for this motion are as follows:

1. Central States Pension Fund is the largest multiemployer defined benefit pension plan in the country. The Pension Fund covers approximately 400,000 active participants and retirees.

2. Since 1980 approximately 1500 employers have withdrawn from Central States. Central States has assessed withdrawn employers for over $1 billion in withdrawal liability.

3. Several hundred withdrawn employers have invoked the dispute resolution procedures for withdrawn employers under the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) to challenge their withdrawal liability assessments. *See*, 29 U.S.C. §§ 1399(a) and 1401.

4. Petitioners seek a constitutional ruling of such broad scope that it would, if rendered in their favor, eliminate or greatly curtail Central States' ability to collect withdrawal liability.

5. A ruling in favor of petitioners would encourage employer withdrawals and litigation in contravention of the stated policies of MPPAA and would greatly increase the costs to Central States and other multiemployer plans.

6. *Amici curiae*, Midwest Motor Express, *et al.* invite this Court to consider Central States as a reason for deciding this case in favor of petitioner. Amici present a highly distorted view of Central States to which Central States would respond.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND IN SUPPORT OF RESPONDENT

INTRODUCTION

Central States, Southeast and Southwest Areas Pension Fund is a multiemployer defined benefit pension trust fund established in 1955 by the Central Conference of Teamsters and the Southern Conference of Teamsters (affiliates of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America)

and by various employer associations pursuant to section 302(c)(5) of the Labor Management Relations Act (LMRA). The Pension Fund is governed by a Board of Trustees consisting of an equal number of union and management appointees (four of each). The Pension Fund is administered for the exclusive benefit of the participants to whom the Trustees owe an undivided duty of loyalty. The purpose of the Pension Fund is to pay retirement and certain other benefits to participants and their beneficiaries who become eligible under the terms of the Central States' pension plan (the "Plan").

Under the Plan and Trust Agreement participating employers contribute to the Pension Fund pursuant to their collective bargaining agreements for work performed by their covered (bargaining unit) employees. Employees earn credit (accrued benefits) for covered work periods and after earning 10 years of credit, become vested in the benefits. In order for an employer and its union employees to participate in Central States, their collective bargaining agreement, including the contribution rates, must conform to the Trust Agreement and the Plan. The Pension Fund covers 164,000 retirees currently drawing benefits and 238,000 active participants of approximately 5,000 contributing employers.

The Central States Pension Fund is the largest multiemployer pension plan in the country. As of December 31, 1979 (the last year before the enactment of MPPAA), Central States had net assets of $2.4 billion and liabilities for vested benefits of $6.0 billion. As of December 31, 1991 its net assets exceeded $11.8 billion and the present value of liabilities for vested benefits approximated $13 billion. In that 12-year period, the Fund more than doubled its funding percentage so that by December 31, 1991 less than 14% of its vested benefit liability was unfunded, compared to almost 60% at December 31, 1979.

If an employer's obligation to contribute ceases, then coverage ceases for employees of the employer. Neither

employees nor retirees of the employer, however, lose their vested benefits under the Plan; and employees may continue to earn additional benefits by going to work for another contributing employer.

INTERESTS OF CENTRAL STATES

Petitioner challenges the constitutionality of certain provisions of the Employee Retirement Income Security Act of 1974 (ERISA), as amended by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA). Specifically petitioner asks the Court to strike down certain presumptions favoring pension plan determinations in MPPAA arbitrations between plans and employers. Petitioner also seeks to have the withdrawal liability provisions of the statute struck down "as applied" to it.

A. The Presumption

The presumption in favor of pension plans in arbitration is a burden of proof imposed on an employer. If the presumption is struck down, it is likely that employers will assert, and arbitrators may agree, that pension plans bear the burden of proving their assessments of withdrawal liability in every detail or lose the assessment. Central States currently has over 40 arbitrations pending. (This number has remained steady for several years as new cases are opened and old ones closed.) Central States would expect more, and more complex, arbitrations at great cost to Central States and all similarly situated multiemployer pension plans, and in derogation of the purposes of MPPAA. Central States supports respondent and the constitutionality of the statutory presumptions.

B. The "As Applied" Challenge

While petitioner asks only that the statute be struck down with respect to it alone, it is clear that the standard petitioner urges is broad. Virtually every employer who

is assessed withdrawal liability feels unfairly burdened. Central States fears an explosion of constitutional litigation as withdrawn employers seek constitutional equity on a case by case basis. That this fear is not idle is shown by the brief *amici curiae* of Midwest Motor Express, *et al.* which seeks to use Central States as an example of why they believe the statute is unconstitutional. Central States supports respondent and the constitutionality of the statute as applied to every employer.

SUMMARY OF ARGUMENT

This Court granted the writ of certiorari to consider whether the statutory imposition of withdrawal liability on petitioner Concrete Pipe and Products of California, Inc. (CP&P) under the Employee Retirement Income Security Act of 1974, as amended (ERISA), is unconstitutional for two reasons: whether the presumptions in favor of a multiemployer pension plan's assessment of liability against a withdrawn employer deprives the employer of procedural due process and whether statutory imposition of liability on the employer deprives it of substantive due process "as applied."

A. The Statutory Presumption Question

CP&P characterizes pension plan trustees as unrestrained and overreaching claimants whose goal is to assert the highest possible withdrawal liability claim against employers and to whom the statute grants a virtually irrebuttable presumption in favor of their unreasonable claims. The combination of bias and presumption, CP&P claims, makes the statute unconstitutional. The trustees are, however, probably less biased than the typical civil claimant. Unlike the typical claimant, the trustees operate under detailed statutory rules and agency regulations that must be followed strictly in calculating withdrawal liability. The trustees do not gain personally by exaggerating the claims. To be sure, trustees have a fiduciary duty to plan participants, but

that duty requires them to follow—not violate the statute. A presumption in favor of these trustees is thus actually less onerous than many presumptions in favor of individual claimants with a personal stake in the outcome that this Court has held constitutional. See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed. 752 (1976).

Moreover the presumption is not irrebuttable. It is simply a burden of proof that applies only to trustee fact findings. The employer is entitled to make a record from which clear error, if it exists, may be determined. Legal determinations are, however, entitled to no presumption of correctness. Any claimant's bias would more likely be found in the legal calls trustees make—*e.g.*, the determination to pursue a claim for which the employer may have a defense. But arbitrators and courts have free reign under the statute to correct the bad calls of trustees. The presumptions are thus not unconstitutional.

B. The "As Applied" Question

CP&P claims that the statute is unconstitutional *as applied* to it under the particular facts and circumstances of this case—a seemingly narrow question. It is readily apparent, however, that CP&P's attack is not narrow. It seeks a rule from this Court that would in effect invalidate withdrawal liability in most (if not all) cases. This is a point not lost on *amici* Midwest Motor Express, Inc., *et al.*, who seek to generalize the discussion to apply to Central States, a non-party, upon the sketchiest and most misleading of records. In short CP&P and *amici* seek no less than to overturn this Court's rulings in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984) and *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1986).

Of course CP&P does not ask for outright overruling of those cases. It believes it has found a back door—

the "as applied" challenge. CP&P seeks nothing short of a right for it and every other withdrawn employer to have their cases weighed individually on a constitutional balance. By the facts it pleads it would have the Court tip that balance in a way that would allow virtually all employers to escape liability because the statute does not, and was not intended to, impose liability with mathematical precision to account for an employer's own employees' earned benefits. Quite to the contrary, the statute recognizes that much pension plan liability is unattributable to any now existing contributor, but that someone has to pay it—contributors or participant employees (through lost benefits)—and Congress chose the contributors. That choice is not unconstitutional. These plans are insurance vehicles for both employers and employees. CP&P knew this when it voluntarily agreed to participate in the plan. It is impossible to say whether CP&P's employees earned as much in benefits as CP&P paid into the plan, but C&P's bargain with the plan makes that irrelevant.

If the question is narrowed to the "as applied" facts of this case, the attack is yet even more invidious. It suggests that a law that is generally constitutional may not be constitutional in specific cases, which turn on the court-determined degree of the burdens placed on the employer. If CP&P is correct, then Congress may legislate generally, but the courts will adjust the statute according to the equities of each case: in short "constitutional equity." This is substantive due process beyond even the now-rejected reach of *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905). And the concept of an unconstitutional taking "as applied" defies comprehension. Under *R.A. Gray* and *Connolly* the statutes is constitutional "as applied" to CP&P.

ARGUMENT

I. THE STATUTORY PRESUMPTIONS ARE SIMPLY A REBUTTABLE BURDEN OF PROOF THAT COMPORT FULLY WITH DUE PROCESS

Central States has surveyed all of its MPPAA arbitrations for which there are written awards to examine whether and in what way arbitrators have employed the presumptions of 29 U.S.C. § 1401(a)(3). There are 32 cases of which employers have won 10 and Central States has won 23 (one case is counted twice because each party won a significant issue).

Of those 10 cases won by employers, the presumptions were acknowledged in 5 and the employer met its burden. Two of these are published.[1] (The other 5 involved, for the most part, legal questions for which the presumptions do not apply.) In those 23 cases won by Central States, the presumptions were acknowledged eight times, but were only clearly applied three times. Five of these eight decisions (including all three where the presumption was applied) are published.[2]

What is striking about these cases is the small degree to which the presumptions play any roll. Especially significant to this case is the apparent fact that in practice these presumptions are applied by arbitrators as a simple burden of proof. In none of these arbitrations—indeed in no MPPAA arbitration known to Central States—is there

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[1] *Carnation Co. and Central States Pension Fund*, 9 Employee Benefit Cases (BNA) (hereinafter "EBC") 1409 (Am. Arb. Assn. ("AAA") 1988); *Oolite Industries, Inc. and Central States Pension Fund*, 8 EBC 2009 (AAA 1987).

[2] *Bronough Motor Express and Central States Pension Fund*, 6 EBC 2137 (AAA 1985); *Cullum Cos. and Central States Pension Fund*, 10 EBC 1926 (AAA 1988); *Don Hutson, Inc. and Central States Pension Fund*, 8 EBC 2319 (AAA 1987); *Loomis Armored, Inc. and Central States Pension Fund*, 8 EBC 1899 (AAA 1987); *Marvin Hayes Lines, Inc. and Central States Pension Fund*, 8 EBC 1845 (AAA 1987).

the slightest evidence of an arbitrator, hobbled by these presumptions, simply deferring to pension plan determinations in the face of substantial employer evidence.[3]

For example, in *Bronough Motor Express and Central States*, 6 EBC 2137 (AAA 1985) the arbitrator repeatedly referred to the paucity of the employer's evidence. Notwithstanding the presumptions it is clear from the arbitrator's conclusions that he applied a simple preponderance of the evidence standard and that the employer not only failed that burden, but any burden.

> As stated above, MPPAA provides that the determination made by the Fund's Trustees must be shown by a preponderance of the evidence to be unreasonable or clearly erroneous in order for the contesting party to prevail. This record simply does not, by a preponderance of evidence, establish that the Fund's Trustees' determination was unreasonable or clearly erroneous. The record clearly reveals the Company was given ample opportunity to provide necessary proof to the Fund. It was unable to demonstrate a duty or obligation to continue contributions to the Fund. The record fully supports the determination of the Trustees. Finding no evidence of a continuing obligation to contribute, the Trustees had no alternative and properly held a complete withdrawal had occurred.

Id. at 2142.

Another arbitrator, confronted with questions regarding the constitutionality of the presumptions, determined to bypass them entirely yet still used a preponderance of the evidence standard.

> However, the constitutionality of Sec 4221(a) is in this case immaterial. Without reference to the presumption in favor of Fund's determination, I have judged whether a preponderance of the evidence establishes whether the Fund's determination was reasonable or unreasonable.

Loomis Armored, Inc. and Central States Pension Fund, 8 EBC 1899, 1906 (AAA 1987). With and without the presumption the *Bronough* and *Loomis* arbitrators used the same standard.

A third arbitrator, confronted with the same constitutional questions, determined that the weight of authority required him to follow the presumptions. Yet the standard used by him is an even weaker burden on the employer than used by the *Loomis* arbitrator.

> Although the Supreme Court's 4 to 4 vote in *Yahn & McDonnell* certainly places considerable uncertainty on the ultimate fate of the statutory presumptions, it is undisputed that the Supreme Court's action in that case has no precedential value. Accordingly, I believe I am obliged to follow the present weight of appellate authority which, as noted above, has upheld the presumptions' constitutionality.
>
> However, I do follow the Fund's suggestion that the presumptions be given only the limited role which the Pension Benefit Guaranty Corporation recommended to the Supreme Court in *Yahn & McDonnell*. There the PBGC suggested that § 4221(a)(3) be construed as simply placing on the employer the burden of going forward and of persuasion, and such approach has since been adopted by the court in *Banner Industries v. Central States, Southeast and Southwest Areas Pension Fund*, 86 C 3046 (N.D. Ill. Sept. 23, 1987). I can also state that the presumptions as thus construed have not affected in any material respect my determinations with respect to any of the issues herein.

Carnation Co. and Central States Pension Fund, 9 EBC 1409, 1418 (AAA 1988). In an accompanying footnote the arbitrator noted that his approach was consistent

[3] A list of the Central States arbitration decisions is included in the appendix, including citations of published decisions. Most of these decisions detail the parties' positions, but almost nowhere do we find evidence of employer accusing trustees of bias. *But see Carnation*, 9 EBC at 1409.

with the discussion in *Washington Star Co. v. International Typographical Union Negotiated Pension Plan*, 729 F.2d 1502, 1511 (D.C. Cir. 1984). The arbitrator found that the employer met its burden and ruled against the Fund.

Others arbitrators, while acknowledging the presumptions, have implicitly set them aside and gone about their business of deciding who is right and who is wrong.

> To the contrary, the arbitrator's sole function is to review the correctness of a plan's withdrawal liability determinations under sections 4201 through 4219 of ERISA, and those determinations may be overturned only if they are "unreasonable or clearly erroneous." ERISA section 4221(a)(1) and (a)(3). If the plan's determinations are correct, they must be enforced; if incorrect, they must be modified to conform to the statute.

Don Hutson, Inc. and Central States Pension Fund, 8 EBC 2319, 2327 (AAA 1987).

One of the few arbitrators to grapple with the specific language of the presumptions analyzed them as follows:

> In order to prevail, the party contesting the plan sponsor's determination must (A) prove to the arbitrator, definitely and firmly, on the basis of the entire evidence, that mistake has been committed, or (B) convince the arbitrator that the determination is against controlling law or is unsupported by a coherent legal argument. 7 EBC 2572. In the matter before me, the Company has convinced me that the Fund's determination is against controlling law; specifically, it is not in accordance with the Plan document.

Oolite Industries, Inc. and Central States Pension Fund, 8 EBC 2009, 2019 (AAA 1987). To this arbitrator the employer's burden was perhaps a bit heavier but did not rise to constitutional dimension. Indeed, in that case Central States tried to explain the meaning of words adopted

by its own trustees in the plan and lost. If this were trustee bias, then the presumption certainly did not aid it.

Actually trustee bias is most notable for its absence in these arbitration cases. If it were present one would expect the employer to make it a centerpiece of its case. In only one case was trustee bias strongly argued by the employer. The arbitrator rejected it as follows:

> I have not adopted Carnation's further contention that the type of trustee bias cited by the Third Circuit in *Yahn & McDonnell* has actually been demonstrated in the present case. It is true that the Central States staff did strongly importune Mr. McGinn to reexamine his originally presented UVB figure, and that his new UVB figure was responsive to their objections. However, I am unable to conclude that Messrs. Trojak and Frawley, both of whom testified at the hearing, were prompted by other than their own sincere reservations regarding McGinn's original figure.

Carnation, 9 EBC at 1418. What the employer had thought was bias turned out to have been a diligent staff recognizing an actuary's error and taking steps to have it corrected.

These arbitration decisions seem to be representative of MPPAA arbitrations generally.[4] If they are special in any way it is that they mention the presumptions at all. Only 13 of the 32 Central States cases referred to the presumptions. What is clear from the MPPAA arbitration universe, however, is that arbitrators, whether ruling for employers or plans, regard the presumptions as just a burden of proof to be borne by the employer. In fact if we imagine a statute that had no presumptions, but required the employer initiate arbitration to make its

[4] This is not really surprising since the arbitrators are selected from a national list maintained by AAA, have probably handled a number of these cases, and certainly are aware of each others' decisions.

case (as MPPAA does), it is hard to imagine how these cases might have been differently decided.

What is obvious from examining these and any other MPPAA arbitrations is that the horribles advanced by CP&P (the same as imagined by the Third Circuit in *Yahn & McDonnell*) have not come to pass. The reason is twofold. First, the trustees have no inherent bias. Second, even if trustees were to make a biased decision, the presumption would not shield it from effective review. The D.C. Circuit got it completely right.

> Although the initial determination of the amount of withdrawal liability is made by the plan trustees who are under a fiduciary duty to act solely in the interest of the plan's participants and beneficiaries, *see* 29 U.S.C. § 1104(a)(1) (1976 & Supp. V. 1981); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 101 S.Ct. 2789, 69 L.Ed.2d 672 (1981), the trustees have no inherent bias or duty to maximize the employer's withdrawal liability . . . . We conclude that the trustees' fiduciary duties require them to act neutrally and reasonably in making withdrawal liability determinations. Furthermore, we interpret the presumptions under the MPPAA, in favor of a plan's withdrawal liability assessments, not to insulate the trustees' determinations from effective review, but rather to require the trustees affirmatively to provide some support for the reasonableness of their determinations in the event that the employer introduces evidence to the contrary.

Washington Star, 729 F.2d at 1511.

But what if the trustee bias were hidden? Could the arbitrator unknowingly participate in the bias by applying even a weak presumption? If the bias were in concocting false "facts," then it would seem that the employer should be able to show the correct facts just as in any trial. If after hearing the evidence the arbitrator determines the case is in equipoise, then the employer has failed to prove its case and ought to lose as it would in a

non-MPPAA trial. And if the "bias" were in the way the trustees interpret the statute—choosing for example, as fiduciaries, to press a case whose legal outcome is uncertain—that is no more than any claimant's right. Moreover such determinations are legal in nature, not factual, so are not even subject to the presumptions.

Of course this Court might determine that five circuits and innumerable arbitrators have erred—that rather than applying the presumptions as written, they have put on a judicial gloss that softens their impact. This does not appear to be the case, but if it were, then maybe later courts and arbitrators might be less generous and all the horribles imagined by CP&P might come to pass. Should this Court preemptively strike down the statute? Not in this case.

If all of this seems highly speculative, it certainly is. The problem with the instant case is that it does not present a clear example of the presumption being applied in an unconstitutional manner. If this Court is uncertain, it should not rule preemptively, but should await a case that actually shows the MPPAA procedures in failure. This is not such a case, and it is highly unlikely one will come along, but if it does, the Court may then act.

An even better alternative of course would be to adopt the reasoning of the D.C. Circuit. That would preempt the possibility of future rogue arbitrators deciding the presumptions mean much more than heretofore thought.

The above analysis begs a final question. If the presumptions are so benign as to barely alter (if at all) the burden that would in their absence attach to the employer claimant in arbitration, then why would Central States or other plans care if this Court struck them down. The answer lies in the expectations of employers like CP&P. If the presumptions are struck down, we can safely assume that employers will argue that pension plans bear the burden of proving their assessments of

withdrawal liability in every detail. Should Central States have to prove that its actuarial tables are better than all others? And if it is impossible to say which actuarial table is the "correct" table, has Central States failed in its burden? Even if all acknowledge that Central States has some level of unfunded vested benefits, must it be barred from collecting withdrawal liability because actuarial science is imprecise? This is the ultimate hope of employers like CP&P. This Court should not leave that door open.

The statutory presumptions quiet, as they were intended to, such fruitless litigation. Accordingly this Court should affirm the constitutionality of the presumptions. But if the Court should strike them down, it should clarify that the usual claimant's burden of proof continues to rest with the employer.

II. THE CONSTITUTIONALITY OF STATUTES UNDER THE FIFTH AMENDMENT RESTS ON THEIR GENERAL APPLICATION; INDIVIDUAL COMPANIES LIKE CP&P ARE NOT ENTITLED TO COURT-PROVIDED SPECIAL EXEMPTIONS ON THE GROUNDS OF CONSTITUTIONAL EQUITY.

CP&P opens its argument with the unsupported and demonstrably false statement that "Congress adopted MPPAA with the goal of charging the cost of funding benefits promised to a withdrawing employer's employees to that employer at the time of withdrawal." CP&P brief at 19. Congress, CP&P implies, ineptly failed to achieve that goal when it allocated liability by contribution share rather than by attributable liability. *Id.* at 26. Thus, CP&P concludes, employers like it whose liability greatly exceeds the value (zero, it claims) of benefits owed to its employees are entitled to constitutional relief. CP&P is wrong on all counts.

Congress was well aware that multiemployer pension plans have accumulated large liabilities for participants and retirees which are not attributable to any presently

contributing employer. A major reason for MPPAA was to prevent further accumulation and to insure existing benefits are funded. These trusts are, under § 302(c)(5) of the Labor Management Relations Act, pooled trusts for which contributions are made for the benefit of all participants—not just an employer's own employees. And benefits are payable to any eligible participant from the pool regardless of the employer's actual contribution history. Thus, an employer's contributions are determined on fund-wide needs and not on the actuarial characteristics of the employer's employees. Contributing employers share equally in paying for all benefits under the plan by paying a level contribution rate. In this respect the plans are like life insurance group annuities. Some participants will draw more benefits than contributions made on their behalf and others will draw less. Some employers will pay more in contributions than their employees receive in benefits and others will pay less.

In enacting MPPAA Congress well understood this insurance aspect of these plans.

> Multiemployer plans are also characterized by a "self-insurance" feature which enables a plan participant to retain benefit credits earned for service with a contributing employer even though the employer subsequently ceases contributing to the plan. A contributor's obligation to continue to fund the benefit obligations of a multiemployer plan normally ceases upon the contributor's withdrawal from the plan, whether a result of the cessation of the contributor's covered operations or the termination of the collective bargaining relationship. Thus contributors who remain in the plan and newly entering contributors have the burden of funding the unfunded benefit obligations for employees of a withdrawn employer.

H.R. Report 96-869 Part I, Committee on Education and Labor, 96th Congress, 2d Sess. (April 2, 1980) at p. 53. When Congress enacted MPPAA many of these liabilities had already been left behind and payment was shared by all contributors. So when Congress imposed with-

drawal liability on newly withdrawing employers for "their fair share of the plan's unfunded benefit obligations," *id.*, it was clear that withdrawn employers would be paying more than just for their own employees just as they had in contributions before they withdrew. The employer's share of contributions to the fund establishes under 29 U.S.C. § 1391 the proportion by which fund liabilities are allocated to it after it withdraws. The employer's pre-withdrawal share of total plan liabilities therefore can no longer be dumped by the employer, but, under MPPAA, must be paid as withdrawal liability after the withdrawal.

The second flaw in CP&P's reasoning is its belief that its employees earned no benefits under the plan. CP&P has ignored the second major feature of multiemployer plans.

> Multiemployer plans have historically provided a high degree of benefit security to plan participants because of the features of "pension portability" and self-insurance" which characterize such plans. Pension portability under a multiemployer plan means that a participant's benefit is based on service with all contributing employers for whom the participant has worked. This enables a participant who moves from one contributing employer to another, who might otherwise not be eligible for benefits based on service with any one employer, to receive a pension if his or her total service with all the contributing employers is sufficient to satisfy the plan's requirements for a vested benefit.

H.R. Report 96-869 Part I, *supra*, at p. 53 . It is probable that some, perhaps many, of CP&P's employees earned benefits: some may have vested while employed by another employer and then have earned additional vested benefits with CP&P; some may have some prior service credit with earlier employers and then became vested while working for CP&P; and some may have vested while working for later employers based in part on prior

service with CP&P. The fact that CP&P contributed for fewer than 10 years is thus largely irrelevant to the value of benefits earned by its employees.[5] It is their total service under the plan with CP&P and others that determine plan liabilities.

CP&P is thus entirely wrong in its premise. MPPAA liability, it turns out, is rationally related to the ends sought by Congress even as it is applied to CP&P.

But suppose CP&P were right and its employees earned no benefits. Should it follow, under the Constitution, that CP&P must pay no liability? In CP&P's view, yes. Either Congress must tailor its statutes to the unique circumstance of each regulated individual, or the courts must step in under constitutional authority to block the statute's burdens where "undue."

In asking this Court to rule that MPPAA violates substantive due process "as applied" to it, CP&P really asks this Court to add a new dimension to constitutional analysis. The test has heretofore been whether the challenged statute bears a rational relationship to a valid state interest. See *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974). This Court has never held that there is an "as applied" dimension to this test that extends it to each affected entity individually.

CP&P seems to concede that the statute meets the aggregate test (see *R.A. Gray*), albeit reluctantly. Under the claimed "as applied" dimension, however, the statute's applicability to certain employers would be constitutionally invalid. Congress may shift benefits and burdens of economic life generally, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed. 752 (1976),

[5] And under the insurance principle of these plans it is irrelevant whether they actually earned any benefits—they might have. CP&P left the plan after only a few years, but it might have stayed for many. This was CP&P's insurance as well as its employee's. Having bought insurance but having no claim, CP&P cannot now have its premium back.

but CP&P claims it may not raise the burden too high in any case. The law will thus apply to some but not others in the sole discretion of the courts.

This Court should reject "as applied" substantive due process as an invidious invitation to the courts to fine tune legislation. Such fine tuning of individual cases would severely undercut congressional authority and would result in uneven application of the laws. Central States has argued to this Court in another case that Congress' power to legislate individually is restrained by the constitutional requirement of public purpose. See *Central States v. Lady Baltimore Foods, No.* 92-150 (pet. for cert. filed June 30, 1992). Here CP&P argues by implication that Congress *must* legislate with the specific individual in mind (as it did in *Lady Baltimore*) or risk the courts' intervention on constitutional grounds. This argument rejects public purpose altogether in favor of individual equity. Such a pernicious suggestion should be rejected out of hand.[6]

What we see in CP&P's argument is the last vestige of the long-discredited notion that multiemployer plans are really "individual account" plans for each employer. See *Connolly v. Pension Benefit Guaranty Corp.*, 581 F.2d 729 (9th Cir. 1978). If an employer's liabilities are constitutionally limited to the value of its employees' benefits, then in effect the plan is an aggregate of single-employer plans under a common administration. Some employers (CP&P thinks it is one) would be winners if liabilities were so limited, but it would necessarily be more costly to others—particularly continuing contributors that must fund unattributable liabilities. And as more employers

[6] Perhaps CP&P's real argument ought to be under equal protection. On what rational basis did Congress decide *Lady Baltimore*, a highly solvent corporation whose employees admittedly earned benefits under Central States, deserved an exemption while CP&U did not? This underscores why Congress was wrong to exempt *Lady Baltimore*. Are the courts better equipped to provide exemptions for employers like CP&P?

take advantage, the ultimate losers are the plan participants (especially retirees) who are not attributable to any contributor. This adverse selection thoroughly undercuts the insurance principles upon which these plans are founded, and would destabilize and threaten the continuing viability of these plans.[7]

ERISA and MPPAA policies are reasonably applied in the aggregate by these statutes. CP&P is entitled to no special consideration. Indeed special consideration would itself violate the guiding principles of due process—even application of the laws. This court should affirm the judgment of the court below.

CONCLUSION

The presumption in favor of the correctness of a pension plan's factual determinations is a constitutional allocation of the burden of proof. The statutory imposition of liability to withdrawn employers is constitutional in its general application, and there is no constitutional requirement that statutes be tailored to prevent "undue" harshness in individual cases.

Respectfully submitted,

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[7] A similar assault on these plans through adverse selection can be seen in *Local 144 Nursing Home Pension Fund v. Demisay*, No. 91-610 (currently being briefed before this Court). In both cases the employers' principal motive is to insulate themselves from liabilities attributable to employees of other employers in contravention of insurance principle foundation of these plans.

APPENDIX

CASES

Banner Industries, Inc. and Central States Pension Fund, 11 EBC 1149 (AAA 1989)

Bronough Motor Express and Central States Pension Fund, 6 EBC 2137 (AAA 1985)

CAT Worldwide Moving, Inc. and Central States Pension Fund, No. 51-621-0002-91V (AAA, Nov. 14, 1991)

Carnation Co. and Central States Pension Fund, 9 EBC 1409 (AAA 1988)

Chemed Corp. and Central States Pension Fund, 11 EBC 2681 (AAA 1990)

Crown Cork and Seal Co. and Central States Pension Fund, No. 51-621-0022-89V (AAA, Jan. 15, 1991)

Cullum Cos. and Central States Pension Fund, 10 EBC 1926 (AAA 1988)

Don Hutson, Inc. and Central States Pension Fund, 8 EBC 2319 (AAA 1987)

Drivers Hire, Inc. and Central States Pension Fund, 11 EBC 2029 (AAA 1989)

Frank D. Saylor & Sons, Inc. and Central States Pension Fund, No. 51-621-0007-89V (AAA, Oct. 8, 1990)

Houston Natural Gas Co. and Central States Pension Fund, 12 EBC 1019 (AAA 1989)

Lady Baltimore Foods, Inc. and Central States Pension Fund, No. 51-621-0011-85V (AAA, May 22, 1990)

Loomis Armored, Inc. and Central States Pension Fund, 8 EBC 1899 (AAA 1987)

Marvin Hayes Lines, Inc. and Central States Pension Fund, 8 EBC 1845 (AAA 1987)

McNicholas Transportation and Central States Pension Fund, No. 51-621-0011-89V (AAA, Oct. 27, 1989)

CASES

Midland Warehouse, Inc. and Central States Pension Fund, No. 51-621-0011-91V (AAA, Jun. 12, 1992)

MountainWest Savings & Loan Assn. and Central States Pension Fund, No. 51-621-0020-87V (AAA, June 24, 1988)

Oolite Industries, Inc. and Central States Pension Fund, 8 EBC 2009 (AAA 1987)

Private Carrier Personnel and Central States Pension Fund, No. 51-621-0006-87V (AAA, Oct. 9, 1987)

RLC Corp. and Central States Pension Fund, No. 51-621-0037-87V (AAA, Jan. 6, 1989)

Raytheon Co. and Central States Pension Fund, No. 51-621-0003-87V (AAA, Nov. 7, 1988)

Rentar Driver Services and Central States Pension Fund, 11 EBC 1637 (AAA 1989)

Santa Fe Southern Pacific and Central States Pension Fund, No. 51-621-0012-88V (AAA, Nov. 8, 1991)

Seaman Patrick Paper Co. and Central States Pension Fund, 10 EBC 1985 (AAA 1989)

Square D Co. and Central States Pension Fund, No. 51-621-0018-88V (AAA, July 13, 1989)

Tom Boy, Inc. and Central States Pension Fund, 10 EBC 2532 (AAA 1989)

Tri-State Rubber & Equipment, Inc. and Central States Pension Fund, No. 51-621-0024-86V (AAA, Dec. 8, 1987)

Uniroyal, Inc. and Central States Pension Fund, No. 51-621-0007-87V (AAA, Dec. 24, 1987)

United States Steel Corp. and Central States Pension Fund, 10 EBC 2324 (AAA 1989)

United Trucking Services of Indiana, Inc. and Central States Pension Fund, No. 51-621-0003-88V (AAA, June 2, 1989)

Wetterau, Inc. and Central States Pension Fund, No. 55-621-0033-87V (AAA, Sept. 11, 1991)